1977

Wanda Sandberg; Wanda Sandberg, Administratrix of The Estate of Wayne Sandberg, Deceased; Jeffrey Scott Sandberg; Susan Sandberg, By Wanda Sandberg, Her Guardian v. Robert D. Klein, Avalon Klein, Jane Doe And All Other Persons Unknown Claiming Any Right, Title Or Interest In The Real Property Described In Plaintiff's Complaint Adverse To Plaintiffs' Ownership) Or Any Cloud Upon Plaintiffs' Title Thereto And In The Matter of The of Wayne Sandberg : Brief of Respondent

Utah Supreme Court

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.Michael D. Hughes, Royal K. Hunt; Attorneys for Plaintiff's and AppellantsThomas S. Taylor; Attorney for AppellantJames P. Cowley; Attorney for Defendants and Respondents

IN THE SUPREME COURT

OF THE STATE OF UTAH

ANDA SANDBERG, WANDA SANDBERG,
dministratrix of the ESTATE OF
AYNE SANDBERG, Deceased; JEFFREY
COTT SANDBERG; SUSAN SANDBERG,
y WANDA SANDBERG, her Guardian,

Plaintiffs and
Appellants,

.

BERT D. KLEIN, AVALON KLEIN,
E DOE and all other persons
known claiming any right, title
interest in the real property
scribed in Plaintiff's Complaint
verse to Plaintiffs' Ownership
any cloud upon Plaintiffs'
le thereto,

Defendants and
Respondents,

he Matter of the ESTATE
OF
SANDBERG,

Deceased.

BRIEF

An Appeal from
District Court
District, the
District Judge,

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s P. Cowley
n T. Brinkerhoff
ISS & CAMPBELL
South Main, 12th Floor
Lake City, Utah 84101

rney for Defendants and
ondents

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IN THE SUPREME COURT

OF THE STATE OF UTAH

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BRIEF OF RESPONDENT

NATURE OF THE CASE

Appellants filed their action to quiet title to 391.84 acres of unimproved real property in St. George, Utah, and Respondent filed a counterclaim seeking specific performance of an option granted by Sandbergs to Respondent.

PROCEEDINGS BELOW AND DISPOSITION BY THE TRIAL COURT

After the filing of the Complaint, and pursuant to a stipulation of the parties, the trial court entered an order consolidating the civil action with a probate proceeding in which the same issues were pending and granted leave to Respondent to file a Counterclaim (R.353-54). Appellants' Complaint is in the record at page 1, and Respondent's Counterclaim is in the record at page 166.[1/]

Appellants filed a Motion for Summary Judgment, a Memorandum and an Amended Memorandum in support thereof (R.171, 173, 215). Respondent filed a Motion for Summary Judgment and a Memorandum in support thereof (R. 347, 269). The two Motions came on for hearing before the trial court on March 15, 1977. At that hearing the trial court engaged counsel in a careful and penetrating dialogue wherein both counsel made repeated assurances that there were no issues of fact and that the matter could be properly disposed of on the Motions and the materials in the file. The lower court noted that the matter was set for trial and indicated a willingness to hear the Motions only if counsel agreed there were no facts in dispute and that the trial setting could be vacated. Counsel repeatedly insisted that such was the case and agreed to vacate the trial setting and proceed on the Motions (transcript of March 15th, at 5-8). Thereafter, the Motions were argued to the court, and

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1/ The references to the record are to the civil file since the probate file contains no material facts that are not in the civil file. Mrs. Sandberg remarried prior to the commencement of the action and her correct name is now Kurt. Since the documents are in the name of Sandberg, the election has been made by both parties to refer to the principal Appellant as Mrs. Sandberg. It should be noted, however, that references to the Sandberg deposition apply to the deposition of Wanda Kurt.

after having taken the matter under advisement, the court, on March 24, 1977, signed an ORDER denying Appellants' motion, granting Respondent's Motion, ordering specific performance by Appellants and directing Respondent to prepare Findings of Fact and Conclusions of Law (R. 357-359).

On April 7, 1977, Counsel for Respondent mailed to the Court and to Appellants' counsel, Findings of Fact, Conclusions of Law and Order and Judgment and Decree of Specific Performance (R.369-385 and 386-391). The Court signed the Findings and Conclusions and the Judgment on April 11, (R.384, 391) and the same were entered on April 19, 1977 (R. 369, 386).

Contrary to and inconsistent with Rule 52(b) of the Utah Rules of Civil Procedure, Appellants on April 15, 1977, filed general and non-specific Objections to Proposed Findings of Fact and Conclusions of Law (R. 361) and noticed the Objections for hearing in Richfield, Utah, on May 25, 1977. On that same date, April 15th, Appellants filed a Notice of Appeal to the Utah Supreme Court from the preliminary Order of the Court that was signed on March 24, 1977 (R. 363).

On May 24, 1977, the day before the hearing on the Objections in Richfield, Appellants' counsel hand-delivered to Respondent's counsel more particularized objections to the Findings and Conclusions (R. unnumbered but following page 396 and filed in the Supreme Court on June 16, 1977). The trial court, sitting in Richfield on May 25, 1977, declined to consider Appellants' Objections because the Court concluded that it had been divested of jurisdiction as a result of the Notice of Appeal filed by the Appellants on April 15, 1977. On June 6, 1977, the trial court

signed an order to that effect (filed in the Utah Supreme Court on June 20th, in File #15274).

On June 3, 1977, Appellants filed a Motion for Order Extending Time in which to appeal from the Order and judgment and Decree of Specific Performance entered on April 19th (unnumbered but filed in the Utah Supreme Court on June 16, 1977). On June 6th, counsel for Respondent advised the Court by letter, with copy to Appellants' counsel, that he had no objection to the Court extending the appeal time in accordance with the motion of Appellants' counsel. On June 13th the trial court signed an Order Extending Time for Filing Notice of Appeal from the Order and Judgment and Decree of Specific Performance (filed in the Utah Supreme Court on June 20th in File #15274). On June 16th Appellants filed a Notice of Appeal from the Judgment entered on April 19th, 1977 (filed in the Utah Supreme Court on June 20th in file #15274).

PROCEDURAL IRREGULARITY

The Appellants have failed to perfect their appeal from the final judgment of the court made on April 11th, and entered on April 19, 1977, and from which they filed their second notice of appeal. Rather, Appellants, on page 2 of their brief under the heading of "Disposition in the Lower Court", assert that they are appealing from the Order of March 25th. The final judgment of the court entered on April 19th has not been addressed by Appellants. Accordingly, the appeal should be dismissed.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the Summary Judgment as set forth in the preliminary Order of March 25, 1977. Respondent seeks

affirmation of the Order of March 25th and the final Judgment entered on April 19, 1977, the judgment which the Appellants do not address in their brief.

STATEMENT OF FACTS

At the hearing on the Cross Motions for Summary Judgment, the parties affirmatively represented to the Court that the facts were not in dispute and that the Court could decide the case as a matter of law (T.5-8). After hearing argument and taking the matter under advisement, the court made and entered 38 specific Findings of Fact (R. 369-381). It should be noted that in their brief of 103 pages Appellants do not challenge specifically any single Finding of Fact as either controverted or as not supported by the evidence. Respondent asserts that every Finding of Fact is amply supported by the pleadings, answers to interrogatories, depositions and affidavits on file herein and that those facts are uncontroverted.

Respondent respectfully submits that under these circumstances the only facts that need be reviewed are those facts set forth in the trial court's findings (R. 369-381).

For this Court's convenience, it is noted that other than the Findings entered by the trial court, the best organized and most concise and convenient recitation of the facts is set forth in Respondent's unchallenged, unobjected to and uncontroverted Affidavit (R.337-348) and the documents referred to therein and attached thereto as exhibits "A" through "U" (R.294-336).

The trial court's Findings rather clearly set forth the operative facts. In view of the isolated facts selected and distorted in argument by Appellants, Respondent feels compelled to restate

the material facts in a more orderly and less argumentative fashion as follows:

On April 4, 1962, Wayne Sandberg and Wanda Sandberg entered into an Earnest Money Receipt (Finding #2 R.370, R. 294) granting Respondent, Robert D. Klein, a right to purchase certain properties in Washington County, Utah. The original time period during which Respondent had to convert the Earnest Money Receipt to an option was extended. On September 21, 1964, (after the death of Wayne Sandberg) Wanda Sandberg, in her individual capacity and in her capacity as the legal representative of Wayne Sandberg, and Respondent entered into the Option Agreement anticipated by the Earnest Money Receipt (Finding #5 R.371, R.298).

Pursuant to the Earnest Money Receipt and the Option Agreement, Respondent made the following payments to Mrs. Sandberg (Finding #10 R.372, Klein Affidavit #12 R339):

June 14, 1962	$ 500.00
December 14, 1962	500.00
June 14, 1963	1,000.00
December 14, 1963	1,000.00
June 14, 1964	1,000.00
December 14, 1964	1,000.00
June 14, 1965	1,000.00
December 14, 1965	1,000.00
June 14, 1966	1,000.00
December 14, 1966	1,000.00
June 14, 1967	1,000.00
December 14, 1967	1,000.00
June 14, 1968	1,000.00
December 14, 1968	1,000.00
June 14, 1969	1,000.00
December 14, 1969	1,000.00
June 14, 1970	1,000.00
December 14, 1970	1,000.00
	$17,000.00
June 7, 1971 (down payment to commence June 15, 1971 agreement)	2,000.00
TOTAL	$19,000.00

On March 30, 1971, Respondent delivered a letter to Mrs. Sandberg expressing his intention to exercise the option. In that letter he proposed a slight change in the property description, referred to a requested survey, and indicated that he would on or before June 15, 1971, make a down payment of $2,000.00 cash which was required to exercise the option (Finding #9 R.372, R.305-307). Wanda Sandberg received the letter (Finding #9 R.372, Sandberg Answers to Request for Admissions #8 R.133-134).

The property is described in the Earnest Money Receipt and Option Agreement by section numbers with a specific exclusion therefrom of certain property lying east of an established and identified fence. Mrs. Sandberg and Respondent walked the fence together and established the fence as the east boundary of the property being sold in accordance with the terms of the agreements (Finding #28 R.378, Sandberg Deposition 14-15, Klein Affidavit #22 R.343). The fence meandered and a survey was required to establish the precise location thereof to make possible the computation of the acreage and the purchase price (Finding #13 R.373 Finding #28 R.373, Finding #15, R.340, Klein Affidavit #22 R.343, #15 R.340, #17 R.340, Stevens Affidavit #4 R.26, Sandberg Deposition 13). Thereafter, and during the first week in April, 1971, Mrs. Sandberg and Respondent met with Howard Stevens, a professional surveyor. They discussed a survey for purposes of determining the location of the fence and the computation of the acreage and for purposes of preparing a plat for annexation of the Sandberg property to the City of St. George. (Finding #13 R.373, Klein Affidavit #15 R.340, Stevens Affidavit R.263). Mrs. Sandberg agreed to the

survey and agreed to pay one-half (1/2) of the cost thereof (Finding #13 R.374, Klein Affidavit #15 R.340, Stevens Affidavit R.264). At a subsequent meeting with Respondent and the surveyor Mrs. Sandberg, for economic reasons, requested that the survey be delayed to near the time when she would be receiving the first annual payment (June, 1972), and Respondent acquiesced therein (Finding #16 R.375, Klein Affidavit #18 R.341, Stevens Affidavit R.264). The survey was delayed as an accomodation to Mrs. Sandberg. Consequently, the completion and execution of the Real Estate purchase Contract was delayed because an appropriate legal description excluding the land east of the meandering fence could not be obtained and the acreage being sold and the purchase price could not be determined without the survey (Finding #28 R.378, Klein Affidavit #15 R.340, Sandberg Deposition 12-13).

Notwithstanding that the Real Estate Purchase Contract had not been concluded, Respondent on June 7, 1971, delivered to Mrs. Sandberg a check in the amount of $2,000.00 with an endorsement on the face thereof to the effect that it constituted a "down payment to commence June 15 agreement, 1971" (Finding #11 R.373, Klein Affidavit #13 R.339, R.308-309). Mrs. Sandberg accepted and cashed the check. At that same time, Mrs. Sandberg conveyed to Respondent a parcel of 40 acres (Finding #14 R.374, Klein Affidavit #15 R.340, R.311), which conveyance was pursuant to the

release provisions set forth in the Option Agreement,[2/] the terms of which were to be embodied in the Real Estate Purchase Contract (R.300).

Mrs. Sandberg and Respondent met with the St. George Planning Commission with respect to the annexation. At that meeting, Mrs. Sandberg represented that Respondent was purchasing the property (Finding #12 R.373, Klein Affidavit #14 R.340). An annexation plat was prepared and executed by Mrs. Sandberg and Respondent and approved by the City of St. George. The plat annexed to the City of St. George not only property being purchased by Respondent, but contiguous property East of the meandering fence being retained by Mrs. Sandberg (R.109).

On June 7, 1971, Mrs. Sandberg and Respondent met with the Washington County Commission and requested establishment of a survey monument which would reduce the cost of the survey (Finding #15 R.374, Klein Affidavit #17 R.340). The Washington County Commission agreed to have the survey monument established (Finding #15 R.374, Klein Affidavit #17 R.341, R.312). The Respondent paid all of the costs incident to the annexation and a nominal fee charged by the County Commission for the establishment of a survey monument (Finding #36 R.380, Klein Affidavit #17 R.341, R.313).

2/ Respondent calculated in his letter of March 30th that under the terms of the release provisions in the Option Agreement he would be entitled to a release and conveyance to him of 55 acres upon exercise and the payment of the cash down payment of $2,000.00 required to exercise the Option. Respondent did not insist upon the conveyance of the other 15 acres because he was uncertain at that time of which 15 acres he wanted released and conveyed. (Klein Deposition p.9).

In April of 1972, Respondent approached Mrs. Sandberg about the survey and she then for the first time refused to discuss the matter with Respondent (Finding #17 R.375, Klein Affidavit #19 R.342). Respondent authorized the surveyor to proceed and Respondent paid for the cost of the survey (Finding #17 R.375, Klein Affidavit #19 R.342).

Respondent received a letter dated April 20, 1972, from Appellants' counsel (Royal K. Hunt) wherein he asserted that Respondent had exercised the option as to only 40 acres and had not paid the $1,000.00 required in December of 1971, and that because thereof the option was not in good standing and was terminated. Counsel for Appellants did not then assert any other reason for their refusal to proceed (R.314).

On or about May 12, the surveyor completed the survey and provided a legal description of those sections being sold to Respondent which description excluded all of the property east of the fence (Finding #20 R.376, Klein Affidavit #22 R.342, R.264, 319, 320, 321, 328, 335). The survey and the descriptions completed and prepared by the surveyor were transmitted to Mrs. Sandberg on or about May 16, 1972 (Finding #21 R.377, R.322).

On or about May 16, 1972, Respondent prepared, executed and transmitted to Mrs. Sandberg a Real Estate Purchase Contract (R.32[illegible]) which contract used the description prepared by the surveyor. The Real Estate Purchase Contract was consistent with all of the material terms and conditions of the sale set forth in the Earnest Money Receipt and the Option Agreement, including the legal descriptions of the property according to the parties' understanding thereof,

the consideration to be paid therefor (Finding #37 R.380). On or about June 1, 1972, Respondent tendered to Mrs. Sandberg a Cashier's Check in the amount of $8,624.84 which was the calculated first annual installment required to be made under the terms of the Option Agreement and the Real Estate Purchase Contract (Finding #22 R.377, R.329, 330). Mrs. Sandberg received the tendered check and returned the same to Respondent (Finding #22 R.377, Klein Affidavit #24 R.343, Sandberg Deposition P.35).

On or about June 13, 1972, Respondent addressed a letter to Mrs. Sandberg and enclosed with that letter a Cashier's Check in the amount of $68,359.94, in full payment of the balance due under the Option (Finding #23, R.377, Klein Affidavit #25 R.343, R.331, 332). On July 11, 1972, Appellants' counsel returned the Cashier's Check in the amount of $68,359.94 to Respondent's counsel (Finding #24 R.378, Klein Affidavit #27 R.344, R.336).

The Option Agreement did not specify who was to prepare the Real Estate Purchase Contract. Respondent took the initiative and prepared the same, but preparation was delayed because of Mrs. Sandberg's expressed desire to delay survey expenses (Finding #16 R.375, Finding #29 F.379, Finding #34 R.380, Klein Affidavit #18 R.341, Stevens Affidavit R.264, Klein Deposition P.14-15). Mrs. Sandberg has never specifically objected to any of the terms and conditions set forth in the Real Estate Purchase Contract prepared by Respondent, nor has she ever objected to the real property description prepared by the surveyor, Howard Stevens (Finding #35 R.3805). Mrs. Sandberg, after December of 1971, represented to third parties that Respondent had purchased the property (Finding

#36 R.380 Sandberg Deposition P.51-52). Prior to exercising the option, Respondent paid and Mrs. Sandberg received and accepted $17,000.00. At the time of exercise, June 7, 1971, Respondent paid and Mrs. Sandberg accepted a $2,000.00 down payment. Respondent expended time, energy and money in having a survey monument established, having the property annexed to the City of St. George, and in having the property surveyed, all in reliance on his having exercised the option and in reliance upon Mrs. Sandberg's acknowledgment thereof (Finding #37 R.380). Mrs. Sandberg repeatedly acknowledged and confirmed the existence of the option and Respondent's interest in the property and accepted through June of 1971, without objection, Respondent's timely payments of all amounts due in connection with the transaction (Finding #38 R.380).

On April 8, 1974, Appellants filed this action in the District Court in and for Washington County, State of Utah (R.1). In their Complaint, Appellants affirmatively allege that Wanda Sandberg and Wayne Sandberg granted to Respondent an option to purchase the subject property (R.3 #10). The subject property described in the Complaint is the same property described in the Earnest Money Receipt and is identical to the survey description prepared by the surveyor (Finding #20 R.376, Klein Affidavit #22 R.342, R.2, 3, R.328), which is also the identical description included in the Real Estate Purchase Contract prepared and executed by Respondent (R.324-328), and is the property for which Respondent seeks specific performance of the Option Agreement.

ARGUMENT

POINTS I AND II

STANDARDS FOR AND SCOPE OF JUDICIAL REVIEW

Respondent has no quarrel with the section of Appellants' brief dealing with the scope of judicial review in this case. It is well established in Utah that the Supreme Court may review the facts as well as the law in equity cases before it. However, Appellants' inference on pages 22-23 of their brief that summary judgment was inappropriate in this case[3/] is directly contrary to the representations of Appellants' counsel before the trial court.

At the hearing on the cross Motions for Summary Judgment on March 15, 1977, the trial court engaged counsel in a penetrating colloquy respecting the advisability of deciding this case on Summary Judgment. The trial court stated:

> Okay, I don't want you to dodge around because I am going to tie you down right now. What I am saying is that are you prepared -- do you want to argue this on a Motion for Summary Judgment or are you prepared to stipulate that this case may be submitted to the Court as a question of law based upon your statement of facts as set forth in your Motion for Summary Judgment? (T.6).

This question was particularly important since trial in the matter was calendared just two weeks hence on March 28, 1977. After counsel for all parties stipulated that the matter would be dis-

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3/ In their brief at pages 22-23, Appellants state:

> "It is incredible that the lower court could find, before one witness had taken the stand, that the evidence in the file considered favorably to the Appellants met the high evidentiary standard required to support a decree for specific performance in favor of the Respondent . . ."

posed of by Motion for Summary Judgment, the Court stated further:

> All right, the record should indicate that both sides have stipulated -- now, listen to me, gentlemen, I think there should be no question about why we are here and what you have done. The record should indicate that both parties have made a Motion for Summary Judgment and the Court has advised counsel that if there's a question of law[sic] that the Court felt that the Motions for Summary Judgment should be continued till the time of trial, which was on March 28th. Both parties stipulate there was no issue of fact, subject that the Affidavit filed this morning would be considered as part of the fact.
>
> MR. COWLEY: Uncontroverted.
>
> THE COURT: Uncontroverted fact. So consequently it appears to the Court that this case can be submitted to the Court on the issue of law, period, and the Court will find -- make a decision based on the law in this case.
>
> MR. COWLEY: We so understand, your Honor.
>
> MR. THOMPSON: We so understand and we so stipulate. (T.7).

The propriety of the disposition of this case by means of Motions for Summary Judgment is something that Appellants should not now be heard to raise on appeal, even inferentially.

While Appellants suggest that the Findings entered by the trial court do not reflect the facts, they do not in their brief of 103 pages specifically challenge any single particular Finding as either controverted or as unsubstantiated by the record. Nor do they in their brief even make reference to the Findings of the trial court. That the facts in this case are not in dispute is further evidenced by Appellants' argument at pages 18-19 of their

brief that this case should not be remanded for any reason, but that this Court should make new Findings and enter judgment for them. Respondent submits that if the Findings of the trial court were unreflective of the facts, Appellants would have found room in their 103 page brief to specifically point out the claimed inconsistencies. Without even a single specific challenge to any one of the Findings of the trial court, this Court has no good reason to now look behind those Findings. Each of the authorities cited by Appellants for the proposition that the Supreme Court in equity cases can make Findings and enter judgment is a case in which specific challenges were made to the Findings of the trial court. Appellants have cited no authorities in which the Supreme Court has disturbed the Findings of the lower court when Appellants have made no specific objections to the Findings. With no specific challenge to the Findings, this Court should concern itself only with the legal issues, notwithstanding its power to review the facts in equity cases.

POINT III

RESPONDENT HAS MET THE STANDARDS OF PROOF NECESSARY TO SUPPORT THE JUDGMENT AND DECREE OF SPECIFIC PERFORMANCE

Point III of Appellants' brief is merely a statement of the evidentiary standard that must be met in order to support a decree for specific performance. Respondent does not disagree with the quoted proposition in Appellants' brief that specific performance

requires a contract that is

> free from doubt, vagueness and ambiquity and that it must be sufficiently certain and definite in its terms to leave no reasonable doubt as to what the parties intended, ... Pitcher v. Lauritzen, 18 Utah 2d 368, 423 P.2d 491, 493 (1963).

and

> The evidence of the making of the contract must be clear and convincing, or as stated in some cases, clear, cogent and convincing, or strong and conclusive. 71 Am.Jur. 2d Specific Performance §208 (1973).

Appellants urged this same standard on the trial court below[4/] and the trial court had the standard in mind when it decided the case and entered judgment against Appellants. The record herein and the unchallenged Findings of Fact clearly demonstrate that the burden of proof necessary to support the Order of March 15th and the Order and Judgment and Decree of Specific Performance entered on April 19th has been clearly met.

POINT IV

THE STATUTE OF FRAUDS IS NOT A DEFENSE

Appellants suggest, for the first time on this appeal, that since Mrs. Sandberg refused to execute the Real Estate Purchase Contract (the very performance sought by Respondent and ordered by the lower court) that the statute of frauds relieves them from their contractual duty to perform their prior written and executed

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4/ In their Memorandum (R.173) and Amended Memorandum (R.215) filed in support of their Motion for Summary Judgment, Appellants argued that the Option Agreement in question was voidable as unduly vague and ambiguous, that the option was untimely exercised, and that the option expired by its own terms without being exercised as to the property in question. The trial court specifically found against Appellants on these matters (R.358, 378, 379).

agreements. The inherent defect in such an argument make it worthy of little comment.

First, it is axomatic that the Supreme Court will not consider an issue which was not considered by the court below and which is raised for the first time on appeal. Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973); State By and Through Road Commission v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972); Wagner v. Olsen, 25 Utah 2d 366, 482 P.2d 702 (1970); In re Ekker's Estate, 19 Utah 2d 414, 432 P.2d 45 (1967); Riter v. Cayias, 19 Utah 2d 358, 431 P.2d 788 (1967). At no time in the proceedings before the lower court did Appellants raise any issue respecting the statute of frauds. Based on the above cited authorities, this Court should not now consider an issue which was neither mentioned nor considered by the lower court.

Second, even if the issue is considered by this Court, the statute of frauds does not apply to the circumstances presented by this case. This is not a case in which Respondent is seeking to enforce an oral agreement to convey land. The agreements in this case have all been written. Wayne and Wanda Sandberg executed the Earnest Money Receipt (Finding #2 R.370), Mrs. Wanda Sandberg executed the Option Agreement (Finding #5 R.371). Both agreements were in writing and both agreements contemplated the sale and transfer of the real property in question. The preparation and execution of the Real Estate Purchase Contract was delayed, as an accomodation to Mrs. Sandberg, but it merely embodied the terms of the prior written and executed agreements (Findings #21, 29 R.377, 379). A written agreement was present at every step of the conveyance of real property in this case. By its very terms, the statute

of frauds, Utah Code Ann. §25-5-1 (1953), does not apply to the facts of this case because of the writings that are undisputably part of the record.

Third, even if the contract in question were an oral agreement, the statute of frauds would avail Appellants nothing because the doctrine of part performance would take this case out of the purview of the statute of frauds.[5/] Utah Code Ann. §25-5-8 (1953) states:

> Nothing in this chapter [statute of frauds] contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

5/ The doctrine of part performance in Utah is explained in detail in Randall v. Tracy Collins Trust Company, 6 Utah 2d 18, 305 P.2d 480 (1956). While it is not necessary to apply this doctrine here because of the acknowledged writings, the undisputed facts of this case would meet the requirements for the operation of the doctrine as set forth by the court in Randall:

> The Statute of Frauds, Section 25-5-1, Utah Code Annotated (1953) requires promises to convey interests in land to be in writing; but Section 25-5-8 allows part performance to remove an oral contract from the Statute. The essence of the Utah doctrine of part performance is found in three cases: Brinton v. Van Cott, 8 Utah 480, 33 P.218; Price v. Lloyd, 31 Utah 86, 86 P.767, 8 L.R.A.N.S., 870; and Van Natta v. Heywood, 57 Utah 376, 195 P. 192. Excluding the problem of value of services, three general criteria emerge in removing an oral contract from the Statute of Frauds by part performance. First, the oral contract and its terms must be clear and definite; second, the acts done in performance of the contract must be equally clear and definite; and third, the acts must be in reliance on the contract. Such acts in reliance must be such that a) they would not have been performed had the contract not existed, and b) the failure to perform on the part of the promisor would result in fraud on the performer who relied, since damages would be inadequate. Relinace may be made in innumerable ways, all of which could refer exclusively to the contract. Id. at 484.

Undisputed facts in this case clearly establish part performance by Mrs. Sandberg and Respondent. On June 7, 1971, Respondent tendered a down payment to Mrs. Sandberg which was accepted and cashed (Finding #11 R.373). Pursuant to the release provisions of the option, which provisions were, upon Respondent's exercise thereof, to be embodied in the contract, Mrs. Sandberg made a partial conveyance of the property to Respondent on June 7, 1971 (Finding #14 R.374). In reliance on the agreement of Appellants to convey the property, Respondent made substantial payments over the years which were accepted; Respondent expended time, energy and money in having a survey monument established and in having the property annexed to the City of St. George; Respondent had the property surveyed; and Respondent had the Real Estate Sales Contract prepared. Partial performance by both parties bars a statute of frauds defense.

For the foregoing reasons, Appellants' arguments relating to the statute of frauds should be dismissed as irrelevant.

POINT V

THE OPTION AGREEMENT IS CLEAR AND UNAMBIGUOUS AND CAPABLE OF SPECIFIC PERFORMANCE

a. Contracts Expressly Leaving Material Terms to Future Contractual Agreement are Unenforceable.

Respondent finds it unnecessary to disagree with the lengthy and learned dissertation set forth under this heading on pages 32 through 41 of Appellants' brief. It is noted that Appellants do not attempt to apply the law as stated to the facts in this case. It is suggested that their failure to do so is because the law as stated is not applicable to the facts at hand. The Option Agreement (R.298-302) contains every essential, material term and leaves no terms to future agreement as is readily obvious from even a cursory reading of the document in question.

b. The Option Agreement was not an Agreement to Agree but is a Clear, Unambiguous and Complete Agreement.

The essence of Appellants' argument beginning on page 41 of their brief is that before the option could be exercised, a further agreement of the parties as to the amount of land being purchased was necessary, as well as future agreement as to the amount of down payment and as to the choice of lands to be released to Respondent after the down payment was made. In each instance cited by Appellants, the claimed necessity for future agreement is an alternative to a definite, fixed provision. That is the down payment, for example, is agreed to be $2,000.00, unless the parties mutually agree to something different. In the absence of a mutual agreement changing the fixed provision, the specific provision would bind the parties.

On page 40 of their brief, Appellants state: "there is authority which seems to suggest that even leaving future agreement as an alternative to specified terms may result in a contract being found unenforceable." Appellants, however, fail to cite a single authority that suggests anything of the sort. In this respect, Appellants cite Kline v. Rogerson, 181 P.2d 385 (Cal. Dist. Ct. App. 1947) for the proposition that providing for a future agreement only as an alternative renders a contract void. The holding of that case does not even approximate such a proposition. The court in Kline v. Rogerson stated the following as the sole issue for determination: "Was plaintiff the owner or holder of the check executed by defendant?" Contrary to Appellants' representation that the general phrase "or terms to mutual satisfaction" following very specific terms rendered the contract void, the specific terms of the contract were unenforceable simply because defendant had not signed the contract which meant he had not agreed to the specific terms.

One of the paragraphs of the Option upon which Appellants rely in support of their proposition that further agreement is required is Paragraph 5:

> "The Buyer may exercise his right to purchase this property for the sum of Two Hundred Dollars ($200.00) per acre at any time during the option period, (including any extension period) by executing a contract to purchase all or such part or parts of the property as the parties may agree; such contract to purchase shall provide as follow: . . . ." (R.300, Paragraph 5).

It is submitted that the only reasonable interpretation of the paragraph is that (1) Respondent may exercise the option as to all of the property, or (2) Respondent may exercise as to a part or parts of the property as the parties may agree.

The interpretation contended for by Appellants is an attempt to torture rather clear language into an ambiguity. Taking Appellants interpretation, the result is that whenever the optionee attempted to exercise, he must first obtain the further agreement of the optionor. It is absurd to believe that over a nine year period Respondent paid and Appellants accepted 19 payments totaling $19,000.00 under circumstances where such payments would buy nothing for Respondent except as may thereafter be agreed to by Appellants. It is totally unreasonable to believe that such was the intention of the parties.

There are several well established rules of construction that operate in this case to sustain the trial court's interpretation of the option as unambiguous. First, a construction giving an instrument legal effect to accomplish its purpose will be adopted when it can reasonably be done, and between two possible constructions, the construction that will establish a valid contract should be adopted. Frailey v. McGarry, 116 Utah 504, 211 P.2d 840, 847 (1949); Driggs v. Utah State Teachers Retirement Board, 105 Utah 2d 417, 142 P.2d 657, 663 (1943).

Second, if uncertainty exists as to the interpretation of a contract, the court will endeavor to give the contract a rational and just construction. Continental Bank & Trust Co. v. Stewart, 4

Utah 2d 228, 291 P.2d 890, 893 (1955). While Respondent denies that the option in question is uncertain in any respect, it is both unjust and unreasonable to assume, as Appellants contend in this case, that the parties intended that Respondent should pay Appellant $19,000.00 over a nine year period and then only have the right to ask Appellants to agree to something. Without doubt, the parties always intended that the option covered all the land in certain described sections, excluding therefrom only certain land lying east of a meandering fence.

Third, if a contract contains general and special provisions relating to the same thing, the specific provisions control. Desbien v. Penokee Farmers Union Co-Op, Ass'n., 552 P.2d 917, 923 (Kan. 1976); West v. Aetna Life Ins. Co., 536 P.2d 393, 397 (Okl.App. 1974); Rayburn v. Crawford, 187 Or. 386, 211 P.2d 483, 488 (1949); Crecente v. Vernier, 53 N.M. 188, 204 P.2d 785, 790-91 (1949); Morgan v. Firestone Tire & Rubber Co., 68 Idaho 506, 201 P.2d 976, 983 (1948); Denver Joint Stock Land Bank v. Markham, 106 Colo. 509, 107 P.2d 313, 316 (1940). Each provision of the contract cited by Appellants in their arguments that future agreement was required contains a specific provision followed by the phrase which indicates that other arrangements might be made by mutual agreement. Based on the above cited authorities, the specific provisions prevail over the general provisions.

Fourth, a contract is to be construed so as to give it meaning intended by the parties, and courts will not resort to grammatical niceties or technicalities of punctuation unless they may be util-

ized to make plain that which is otherwise obscure. Rubenstein v. Weil, 75 N.M. 562, 408 P.2d 140 (1965).

Fifth, equity will not allow Appellants to accept the benefits of an agreement for some nine years and receive and accept some $19,000.00 and then resort to sophistry and arguments to avoid their obligations under the option. This Court in Woolsey v. Brown, 539 P.2d 1035 (Utah 1975) stated:

> Equity will not permit a party to accept performance for many years and then claim terms contrary to the evidence, as a basis to substantiate an assertion of indefiniteness, and thus avoid specific performance. Id. at 1039.

The evidence supports the trial court's determination that the parties had agreed to sell the property and no future agreement was necessary.

Respondent's letter of March 30, 1971 (R. 305) addressed to Mrs. Sandberg makes it clear that he will exercise his rights with respect to all the property. The Option Agreement described land in certain sections and then excluded therefrom land lying east of an identified and established fence.

Mrs. Sandberg testified in her deposition that she and Respondent "walked out on the fence and that at that time she was insisting that the meandering fence was the boundary of the property she was selling, and that Respondent agreed thereto (Sandberg depostion p.14-15). Mrs. Sandberg represented to the St. George Planing Commission in April and May 1971 that Respondent was purchasing the property. Mrs. Sandberg on June 7th, 1971 accepted the $2,000 down payment. Respondent, in his

letter of March 30th set forth the calculations showing his entitlement to a release of 55 acres pursuant to the terms of the Option Agreement. Mrs. Sandberg, on June 7th, 1971, conveyed 40 acres. Respondent did not require the conveyance of the other fifteen acres at that time because he was uncertain as to which other 15 acres he wished released (Klein Deposition Page 9). More than 7 months after the June 7th payment, and after December, 1971, Mrs. Sandberg represented to third persons that Respondent had purchased the property (Sandberg Deposition P.51-52). 6/ The trial court found that the Option Agreement of Sept. 21, 1964, was not vague or ambiguous and not an agreement to agree (Finding #32 R.379).

It is obvious from the above-referenced evidence considered by the trial court that the parties always intended that the option covered all the land in certain described sections, excluding therefrom only certain land lying east of a meandering fence and that the description prepared by the surveyor and annexed to the Real Estate Purchase Agreement properly described the land under option.

The most telling and conclusive evidence of Appellants' understanding and intent, however, is found in Appellants' Complaint (R.1). In Paragraph 8 of the Complaint, Appellants describe the real property which is the subject of the action. The description

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6/ These representations to third persons after December, 1971, that Respondent had purchased the property are significant because of a letter sent to Respondent in April of 1972 by counsel for Mrs. Sandberg to the effect that the option had terminated because Respondent failed to make an option payment in December, 1971. Respondent did not make the December, 1971, payment to keep the option alive because the option had been exercised. The statements by Mrs. Sandberg subsequent to December, 1971, that Respondent had purchased the property, show that she, too, understood this to be the case and counsel's April, 1972, letter was nothing more than a feeble attempt to undue something that was otherwise cast in cement.

is identical in every respect to the description prepared by the surveyor and with respect to which the Respondent seeks specific performance. It is the same property that is described in the Earnest Money Receipt. In Paragraph 10 of their Complaint (R. 3) the Appellants affirmatively allege that they granted to the Respondent "an option to purchase the subject property." In answer to the Complaint, Respondent admitted the allegations of Paragraphs 8 and 10 thereof (R.7). Furthermore, Appellants did not raise the issue in their Motion or in their Memorandum or Amended Memorandum. It is suggested that by such pleading, the description of the property covered by the option is not in issue.

Because of the conduct of Mrs. Sandberg and because of the allegations in the Complaint, Respondent has labored under the impression that there has never been any doubt or controversy as to the description of the real property covered by the option and for which Respondent seeks specific performance. It is respectfully submitted that the attempt to obsfucate the real intentions and agreement of the parties, through a confusing rehash of selected and distorted statements and facts and through a tortured interpretation thereof, must fail.

On pages 45 and 46 of their brief, Appellants suggest that the language in the option with respect to the release provision and the down payment require mutual future agreement. Based upon the authorities cited above which discuss the rules of construction, applicable to these circumstances, Appellants' argument of "mutual future agreement" is without merit. It is also submitted that a

reasonable reading of the Option Agreement (R.298) will disabuse the Court of any such notions.

On pages 47-49 of their brief, Appellants quote out of context some portions of Respondent's letter to Mrs. Sandberg of March 30, 1971, and assert that said letter is an acknowledgement that further future agreement was required. This contention is simply erroneous. As the record shows, the letter indicates some interest and inquiry by Respondent to get away from the meandering fence (R.305-307). A review of the letter and the circumstances under which it was written demonstrate that Respondent was proposing some slight modifications to the real property description. Mrs. Sandberg, however, insisted upon her contract right that the meandering fence was the east boundary of the property being sold (Sandberg Deposition P.14-15). Following Mrs. Sandberg's rejection of Respondent's proposals, Respondent then proceeded to obtain the legal description originally agreed upon by the parties by retaining a professional surveyor, Howard Stevens, to complete the survey and calculate the acreage of the property in the described sections, excluding that lying east of the fence. The record fails to reveal that Mrs. Sandberg ever objected to the description proposed by the surveyor.

The Appellants, try as they will, can take little comfort from Davison v. Robbins, 30 Utah 2d 338, 517 P.2d 1026 (1973) and other cases cited by them. In Davison and the other cases cited, there was not an actual defined description of the property within the documents. In this case, the description is set out by sections

(excluding property east of an established and identified fence). The property which is the subject of the option is clearly capable of identification. It was identified in the documents and by the survey. Appellants understanding and agreement thereto is evidenced by their Complaint wherein they affirmatively allege and describe the particular property optioned to Respondent.

c. The Option Agreement is Complete.

On page 52 of their brief, Appellants contend that the Option Agreement was not complete because "Schedule A", an exhibit describing the property was to be attached.[7/] It is true that such an exhibit was never prepared nor attached. However, the Earnest Money Receipt and the Option Agreement contained specific descriptions by section numbers and excluded therefrom certain land lying east of an identified and established fence. It cannot be said that because Schedule A was not attached, the parties had not agreed to the description of the lands being purchased. The only thing that could be accomplished by attaching the exhibit would be to define the fence line.

Mrs. Sandberg accepted payments over a seven year period without complaining about the absence of the exhibit. Mrs. Sandberg and Respondent walked the fence line in the Spring of 1971. Mrs. Sandberg, in the Spring of 1971, agreed to a survey to establish a metes and bounds description of the fence line and agreed to pay

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7/ The option provided that the property was to be

> . . . more particularly described in Schedule A attached hereto, to be signed by the parties and made part hereof for all purposes. (R.60).

one-half of the cost thereof. Mrs. Sandberg, requested a delay of the survey and Respondent agreed to such request. On June 7, 1971, Mrs. Sandberg accepted the down payment of $2,000.00, presumably with knowledge that the non-existent exhibit was not attached to the Option Agreement. Appellant represented to the St. George Planning Commission and thereafter to third parties that she had sold the property. A survey was completed and an accurate survey description was prepared. Appellants did not object thereto.

Finally, the Appellants made a non-issue of the description by alleging in their Complaint that they had granted to Respondent an option to acquire the property described in the Complaint. The property described in the Complaint is the same property described in the documents and surveyed by Howard Stevens, and is the property for which Respondent seeks specific performance.

Deciding a specific performance case, the court in King v. Stanley, 32 C.2d 584, 197 P.2d 321 (1948) stated:

> Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. In the absence of express conditions, custom determines incidental matters relating to the opening of an escrow, furnishing deeds, title insurance policies, prorating of taxes, and the like. Janssen v. Davis, 219 Cal. 783, 788, 29 P.2d 196; Wagner v. Estathiw, 169 Cal. 663, 666, 147 P. 561; Bisno v. Herzberg, 75 Cal.App.2d 235, 241, 170 P.2d 973; O'Donnell v. Lutter, 68 Cal.App.2d 376, 838, 156 P.2d 958. The material factors to be ascertained from the written contract are the seller, the buyer, the price to be paid, the time and manner of payment, and the property to be transferred, describing it so it may be identified. Breckinridge v. Crocker,

> supra, 78 Cal. 529, 21 P. 179; Grafton v. Cummings 99 U.S. 100, 25 L.Ed. 366; O'Donnell v. Lutter, supra, 68 Cal. App.2d 376, 157 P.2d 958. There is no question that these essential items were clearly determinable here. Id. at 324.

With respect to specific performance, the court in Potter v. Bland, 136 C.A.2d 125, 288 P.2d 569 (1955) stated:

> Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. Id. at 573.

See also: Martin v. Baird, 124 C.A.2d 598, 269 P.2d 54 (1954).

Likewise, this court in Johnson v. Jones, 109 Utah 92, 164 P.2d 893 (1946) held that a preliminary agreement for sale of an apartment house was not so incomplete as to preclude specific performance when the essential terms of the contract were ascertainable and were capable of being made certain by extrinsic, parol or documentary evidence. This court stated:

> It is elementary that in equity that is certain which can be made certain. In case certain lands are mentioned by name merely in a contract, without giving a definite description, the lands intended in the contract may always be shown by extrinsic, parol or documentary evidence. See also Pomeroy's Specific Performance of Contracts, 3rd Ed. Sec. 152. Id. at 895.

Appellants cannot claim that any of the essential terms of the option are missing, nor can they contend that the option is incomplete in any particular essential to its enforcement. While the document was not completed by the attachment of the exhibit, there is absolutely no doubt or controversy with respect to the intentions of the parties. It would be inequitable to permit Appellants to have the fruits of their bargain for some seven years and to the

deny Respondent his rights because of the absence of a simple exhibit which, under the existing facts, would neither add to nor detract from the contract between the parties.

POINT VI

THE LAND DESCRIPTION IS NOT AMBIGUOUS AND CONTRADICTORY

On pages 53-63 of their brief, Appellants engage in a series of suppositional and mythical diagrams that are not in the record which they claim support the proposition that the land description is ambiguous and contradictory. If Appellants' suppositions and speculations are intended to confuse rather than clarify, they have succeeded. Their bald assertions and speculative diagrams are not supported by the record. Therefore, the only sensible response within the reasonable limitation of this brief is to say that "it isn't so" and to then state facts that are supported by the record. The facts in the record and the reasonable inferences to be drawn therefrom clearly demonstrate that there is no amgibuity or contradiction with respect to the land description in this case.

Prior to any discussion of this issue raised by Appellants the Court should note two important things. First, at no time in the proceedings before the trial court did Appellants raise any issue respecting an ambiguous and contradictory land description. This Court has always held, without exception, that it will not consider an issue which was not considered by the court below and which is raised for the first time on appeal. Thompson Ditch Co. v. Jackson, 29 Utah 2d 259, 508 P.2d 528 (1973); State By and Through Road Commission v. Larkin, 27 Utah 2d 295, 495 P.2d 817 (1972); Wagner v.

Olsen, 25 Utah 2d 366, 482 P.2d 702 (1970); In re Ekker's Estate, 19 Utah 2d 414, 432 P.2d 45 (1967; Riter v. Cavias, 19 Utah 2d 353, 431 P.2d 788 (1967).

Second, the land description is a non-issue. In their Complaint Appellants affirmatively allege that they granted to Respondent an option on the property specifically described in their Complaint--the same property for which Respondent seeks specific performance. This affirmative acknowledgment by Appellants of the land under option should be dispositive of the controversy over description. Appellants should not be allowed, for the first time on appeal, to raise an issue that controverts their own pleadings in the case.

Notwithstanding the foregoing, it is considered necessary in view of the confusion created by Appellants' brief to comment further.

The Earnest Money Agreement of April, 1962 (R.294), describes the optioned property as follows:

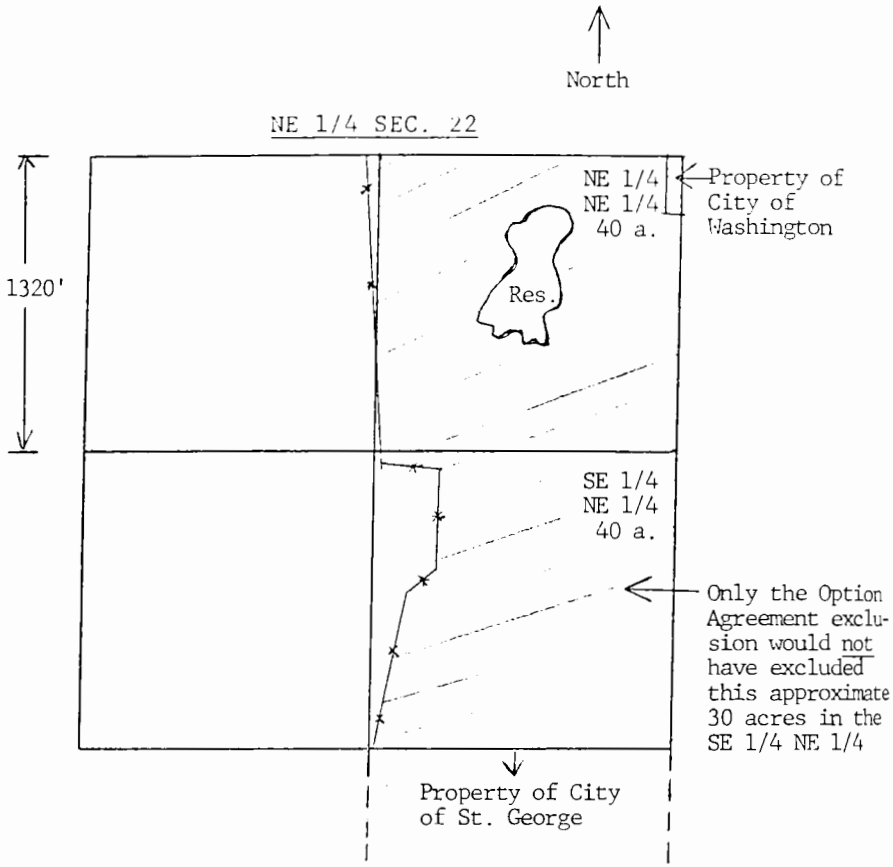
> All land owned by the sellers in Sections 21, 22 and 27, Township 42 South, Range 15 West, S.L.M., consisting, so far as the parties can determine at this time of approximately 500 acres not including any water or water rights, and less the following:
>
> There is now a reservoir constructed by the City of St. George on what the parties believe to be the NE 1/4 NE 1/4 of Section 22, and there is an old fence running north and south west of this reservoir. The sellers intend to reserve from said sale all land in said Section 22 which lies east of said fence line, it being understood that the exact line will have to be determined if and when the option hereinafter mention is executed.

The Option Agreement of September, 1964 (R.298), describes the optioned property as follows:

> ". . . the Sellers do hereby ratify the option granted to the Buyer on June 14, 1962, and which is hereby formally granted, agreed to and acknowledged as an option to purchase all land owned by the Sellers in Section 21, Section 22, and Section 27 of Township 42 South, Range 15 West, Salt Lake Base and Meridian, consisting of approximately 500 acres, which property shall be more particularly described in Schedule A attached hereto, to be signed by the parties and made a part hereof for all purposes; not including any water or water rights, and excluding all land in the Northeast one quarter of the Northeast one quarter of Section 22, which lies East of the old fence line, which runs North and Southwest of the City of St. George reservoir, said excluded property also to be more particularly described in Schedule A attached hereto and made a part hereof for all purposes.

The variance in the descriptions is that the Earnest Money Receipt excludes all land lying east of the fence in Section 22, while the Option Agreement excludes the land lying east of the fence in the Northeast quarter of the Northeast quarter of Section 22. It now appears there was some land in both the Northeast quarter of the Northeast quarter and in the Southeast quarter of the Northeast quarter of Section 22. The literal difference, then, is that the Earnest Money Receipt by excluding all property in Section 22 east of the fence, excluded a small parcel (approximately 30 acres) that was in the Southeast quarter of the Northeast quarter, which was not excluded by the description in the Option Agreement. (See graphical illustration on page 33(a)).

The now apparent variance in descriptions is explainable. In the Earnest Money Agreement, the assumption and the statement are



In summary, (1) the Earnest Money Receipt (R.294), and

(2) the Survey (R.321), and

(3) the Real Estate Purchase Contract (R.324), and

(4) the Plaintiffs' Complaint (R.1), and

(5) the Testimony of Sandberg (Sandberg Deposition p.14-15), and

(6) the Testimony of Klein (Klein Affidavit #22 R.243)

all demonstrate that all property East of the fence in Section 22, i.e., in both the NE 1/4 NE 1/4 and the SE 1/4 NE 1/4 was to be excluded.

Only the unnoted scrivener's erroneous description in the Option Agreement limited the exclusion to the property East of the fence in the NE 1/4 NE 1/4.

to the effect that the fence runs north and south at a location that is west of an old reservoir that is located in what the parties believe to be the Northeast quarter of the Northeast quarter of Section 22. The property east of the fence is to be excluded. The reasonable inference to be drawn is that the property being excluded is in the Northeast quarter of the Northeast quarter. While not a part of the record, it can be assumed that the scrivener of the Option Agreement drew such an inference and provided for an exclusion of that property lying east of the fence in the inferred Northeast quarter of the Northeast quarter, apparently unaware, as were the parties, that the fence actually extended into the Southeast quarter of the Northeast quarter. Both parties signed the Option Agreement. Apparently neither party detected the mechanical error by the scrivener. Both parties during the period of September, 1964, to the filing of Appellants' brief with this Court proceeded with the understanding that all property east of the fence was excluded. Payments were made and accepted through June of 1971 without any comment or objection. Seven years after the execution of the Option Agreement the parties walked the fence line together in the Spring of 1971 and agreed that the fence consituted the east boundary. Appellants never objected to the description provided by the surveyor. Appellants filed their Complaint on April 8, 1974 and affirmatively alleged that they had granted an option to Respondent on specifically described real property, which description as set forth in the Complaint excludes all property east of the fence. Appellants, in support of their Motion for Summary Judgment, filed

a Memorandum and an Amended Memorandum neither of which claim any disagreement as to the property under option.

Relying on Appellants' Complaint and pleadings which established that there was no issue with respect to the description of the land under option, Respondent did not make a record in the trial court with respect to the explanation of the apparent variance.

After the adverse ruling by the trial court Appellants' counsel searched for and discovered and now assert a minor and previously unrelied upon and explainable variance as an ambiguity and a contradiction and try to take comfort therein. The record does not indicate that the parties were aware of the variance. The claim that is now being made is a controversy created for the first time by Appellants' counsel and not by the parties. It is submitted that the claim is without merit and is raised too late.

This Court in Johnson v. Jones, 109 Utah 92, 164 P.2d 893 (1946) decided a specific performance case in which Appellant claimed that the property description was uncertain and indefinite. The Court rejected these claims and held that the description was sufficiently definite and complete when considered in light of Appellants own answer in the case and the extrinsic and documentary evidence. The Court stated:

> The claim that the preliminary agreement is so incomplete and uncertain that an equity court should not decree specific performance, is based upon six grounds. First, it is argued that the property is not definitely and completely described, since a street address is given without indicating in what city, county

> or state the property is situated. By his answer, the defendant admits that he owns the property at 124 East 8th South Street in Salt Lake City, Salt Lake County, State of Utah, so that no uncertainty can arise by reason of ownership of several properties bearing the same address. No question arises as to the fact that the parties in making such incomplete description intended to refer to no property other than defendant's property at the indicated address in Salt Lake City. Appellant's contention in this respect is disposed of by prior decisions of this court. In Easton v. Thatcher, 7 Utah 99, 25 P. 728, a less specific description than the one here involved was held not so uncertain as to justify denial of a decree. It was there held that extrinsic evidence may be introduced to show the exact boundaries and location of property mentioned in the contract of sale. Cummings v. Nielson, 42 Utah 157, 129 P. 619, 622, is to the same effect. We there said: "It is elementary that in equity that is certain which can be made certain. In case * * * certain lands are mentioned by name merely in a contract, without giving a definite description, the * * * lands intended in the contract may always be shown by extrinsic, parol, or documentary evidence." See also Pomeroy's Specific Performance of Contracts, 3rd Ed.Sec. 152. Id. at 895. (Emphasis added.)

This cited portion of the Johnson opinion is clearly applicable to the facts of the instant case. As in Johnson, the description in Appellants' own pleading (Complaint in this case) along with the heretofore cited evidence clearly indicates that there was never any disagreement respecting the description of the property in question.

Appellants make reference to the proposed annexation plat referred to in the letter as if the same were a part of the record. Unfortunately, it is not. Appellants distort the record with an erroneous quotation from the Klein letter of March 31, 1971 (R.305).

Appellants, on page 57 and again on page 98 of their brief, erroneously and improperly quote the Klein letter as stating that he was only annexing,

> "that land which I am in fact buying from you."

Actually, the letter states,

> "You will note that I am only proposing that land be annexed which I am in fact buying from you." 8/

The distinction is important in that it shows not Respondent's statement of fact, but his proposal. The proposed annexation plat is not a matter of record and what it showed or did not show is a matter of conjecture. There is in the record (R.109) a copy not of the proposed annexation plat referred to in the letter, but a copy of the annexation plat as concluded, which demonstrates that the property being retained by Mrs. Sandberg was also included in the annexation. The conclusion drawn by Appellants that the annexation plats - the missing proposal and the finalized plat - show some further variance in legal description is simply not substantiated by the record.

The record clearly shows that the only two descriptions ever used were those contained within the Earnest Money Agreement and the Option Agreement. The variance has heretofore been explained. Appellants discussion about the letter of March 30th and the plats relate only to suggestions, proposals and inquiries. The matter was concluded on the basis of the description contained within the Earnest Money Agreement. It is the same description as that of the

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8/ It is interesting to note that Appellants' counsel correctly quotes the letter on page 90 of their brief.

surveyor, Stevens, and the same description which Appellants in their Complaint affirmatively allege they have optioned to Respondent. It is also the same land described in the Real Estate Purchase Contract prepared and executed by Respondent and forwarded to Appellants.

For all of the foregoing reasons, it is respectfully submitted that Appellants have not demonstrated that the land descriptions were vague and contradictory. Rather, the record and the findings by the trial court persuasively prove that the description of the property optioned to Respondent has never been in doubt.

POINT VII

THE OPTION WAS PROPERLY EXERCISED

At pages 64-80 of their brief, Appellants argue that the option was not properly exercised. Appellants contend that in order to exercise the option, Respondent was required to execute and submit a purchase contract to Mrs. Sandberg prior to June 14, 1971. They further argue that because no purchase contract was submitted to Mrs. Sandberg prior to that date, the option expired, unexercised. Appellants neglect to advise the Court that Mrs. Sandberg requested that the survey, which was necessary for the preparation of the purchase contract in question, be delayed as an accomodation to her. The delay requested by Mrs. Sandberg cannot now be used to Appellants' advantage.

This Court in The Boyer Company v. E. Keith Lignell, No. 14442 (Utah, August 1, 1977) recently reiterated the principle of law

that should govern the resolution of this issue. The Court stated:

> This Court recognizes the principle of law that a party to a real estate listing agreement cannot prevent or interfere with the performance of the agreement and then assert the nonperformance as a defense.

This same principle of law was recognized by this Court in Cannon v. Stevens School of Business, Inc., 560 P.2d 1383, 1385 (Utah 1977):

> A person cannot avoid liability for the nonperformance of its obligation by placing such performance beyond his control by his own voluntary act. Furthermore, no one can avail himself of the nonperformance of a condition precedent, who has himself occasioned its non-performance. (Emphasis added.)

See also, Hoyt v. Wasatch Homes, 1 Utah 2d 9, 261 P.2d 927, 930 (1953). In this case, Mrs. Sandberg requested a delay in the survey which she knew would delay the preparation of the purchase agreement and is now asserting this delay against Respondent.

On March 30, 1971, Respondent by his letter to Mrs. Sandberg clearly indicated that he was exercising the option. He noted her prior request for a survey and agreed thereto. He noted that they had previously walked the fence line and he proposed a slight modification to the description, but agreed to defer to her wishes. He calculated the acreage to which he was entitled under the release provision and requested a conveyance. As required by the Option Agreement, he took credit for only one-half of the option payments and stated that:

> Thereafter acreage to be released at the rate of $200.00 per acre but with no consideration for release of acreage for the $9,000.00 until

> all of the land has been paid for. The remaining money of $9,000.00 to continued (sic) throughout contract without benefit of acreage release until the $9,000.00 is applied to the last payment. (R.306)

Respondent then suggested that three things needed to be completed in April and May:

1. Complete survey to determine exact acreage.

2. Arrive at exact selling price so that exact principal payments could be determined.

3. Prepare land purchase agreement consistent with terms of Option Agreement and the accepted number of acres determined by the survey. (R.305-307)

On June 7th, Mrs. Sandberg, not wanting to then pay one-half of the quoted survey fee of $2,400.00, requested that the survey be delayed until

> near the time when she would be receiving the first contract payment estimated to be $8,500.00 in the month of June 1972. (Finding #16 R.374-375, Klein Affidavit #18 R.341, Stevens Affidavit #5 R.264).

Respondent acquiesced in the request of Mrs. Sandberg.

On that same date, June 7, 1971, Respondent paid and Mrs. Sandberg accepted $2,000.00 with an endorsement on the face of the check that it constituted "Down payment to commence June 15th agreement, 1971" (R.308). On that same day, June 7, 1971, Mrs. Sandberg conveyed to Respondent 40 of the 55 acres to which Respondent was entitled (R.311). The other 15 acres were not conveyed because Respondent was uncertain at that time as to which other 15 acres he wanted released and conveyed (Klein Deposition P.9).

During the months of April and May, Mrs. Sandberg represented to the St. George City Planning Commission that Respondent was

purchasing the property. Sometime after December, 1971, (some seven months after the June 7th payment), Mrs. Sandberg represented to third persons that Respondent was purchasing the property.

The Real Estate Purchase Contract could not be completed until after the survey because the acreage, and the purchase price based thereon at $200.00 per acre, could not be calculated. Consequently, the preparation and execution by Respondent of the Real Estate Purchase Contract was delayed until May of 1972 when the survey was completed. Under such circumstances and based on the above cited authorities, Appellants cannot be heard to complain of Respondent's failure to do that which Mrs. Sandberg's specific request caused him not to do.

The foregoing discussion adequately answers Appellants' contention on page 65 of their brief that the exercise of the Option Agreement by Respondent was improper as to form. Respondent did everything in his power to exercise the option according to its terms. To the extent the option was not exercised in strict accordance with its terms is directly attributable to Mrs. Sandberg.

On page 68 of their brief, Appellants cite authority and argue that the "exercising documents" were on their face preliminary to the exercise of the option. Appellants' argument is confusing at best. They cite authorities which deal with options that required the exercise thereof to be by written statements, and then attack Respondent's March 30, 1971, letter as not complying with the various standards discussed in the cited authorities. The fatal defect in this argument is that the option in question did not require a written formal notice in order to exercise the option.

Appellants' argument and cited authorities are inapposite. The option in this case was to be exercised, as heretofore discussed, in a manner that was delayed by Mrs. Sandberg.

At page 73 of their brief, Appellants argue that the tender of the real estate contract in June, 1972, was not timely. This argument has been discussed amply above. Under the circumstances of Mrs. Sandberg's delay of the survey, the authorities cited above make it clear that Appellants may not take advantage of a situation caused by Mrs. Sandberg.

At page 77 of their brief, Appellants argue that the "exercising" documents were in fact a counteroffer. Appellants' cited authorities are not on point. As heretofore discussed at pages 27-28, the letter of March 30th contained some proposals to Mrs. Sandberg that were rejected. The record in no way supports Appellants' contentions that the exercise of the option was conditioned on any of these proposals. The applicable rule of law in this instance was stated by the court in Duprey v. Donahoe, 52 Wash. 2d 129, 323 P.2d 903 (1958). That court held that where the acceptance of an option to purchase realty is in the first instance unconditional, the acceptance remains unconditional even though a mere request is added for a departure from the terms of the option. The court stated:

> Both the letter and the oral expression made by the optionee established that the option was being unconditionally accepted. The general rule is that,
>
> * * * If the optionee attaches conditions not warranted by the terms of the option to his acceptance or notice of his election to buy, this itself amounts to a rejection;

> but it is otherwise where the acceptance is in the first instance unconditional, and a mere request is added for a departure from the terms of the option as to the time and place of completing the transaction. 55 Am.Jur. 508 §39.
>
> To the same effect, 91 C.J.S. Vendor & Purchaser §10, p.855. Id. at 906.

Appellants have not and cannot enumerate a single modification that resulted from what they characterize as a "counteroffer". The rationality of Respondent's proposal to use the quarter section line rather than the meandering fence as the east boundary is readily apparent from an observation of the graphical illustration on page 33(a), supra. The facts are clear that Mrs. Sandberg rejected the proposals in Respondent's letter. She thereafter accepted the $2,000.00 down payment, she conveyed 40 acres to Respondent, she represented to the St. George Planning Commission that Respondent was purchasing the property, and seven months after accepting the $2,000.00 down payment she represented to third persons that Respondent had purchased the property. In view of these uncontroverted facts, Appellants' argument that the exercise of the option was a counteroffer that was never accepted is totally without merit.

POINT VIII

MUTUALITY IS PRESENT

Appellants commence their section on mutuality by rehashing earlier sections of their brief on alternative contract provisions, vagueness and ambiguity. Respondent has treated these subjects

earlier in this brief and will not repeat the same here.[9/]

While Appellants' argument on mutuality fails to distinguish between mutuality of obligation and mutuality of remedy, there is no problem in this case because both are present.

Appellants' argument implies that equivalance is required between the parties in order to have a valid contract. Neither mutuality of obligation nor mutuality of remedy requires equivalance. This Court in Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823, 825 (1951) stated:

> Moreover, a contract does not lack mutuality merely because its terms are harsh or its obligations unequal, or because every obligation of one party is not met by an equivalent counter obligation of the other party. (Emphasis in original)

Likewise, with respect to mutuality of remedy, this Court stated in Genola Town v. Santaquin City, 96 Utah 88, 80 P.2d 903, 934 (1938):

> The development of the doctrine of mutuality as to remedy reveals that it was founded on the idea that one party should not have from equity what the other party could not have

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9/ The only authorities cited by Appellants in this section of their brief do not deal with mutuality but with arguments previously discussed. At page 82 of their brief, Appellants again cite and explain the Kline v. Rogerson decision. Again, Appellants have misrepresented the holding of that case. That case and its holding are explained on page 21 of this brief.

At pages 82-83 of their brief, Appellants cite this Court's decision in Candland v. Oldroyd, 67 Utah 605, 248 P.1101 (1926), which is neither factually nor legally applicable to the instant case. Unlike the facts of the instant case in which formal written agreements between the parties extended over 9 years, the Court in Candland v. Oldroyd was dealing with the very basics of contract formation. In Candland, this Court held that there was no contract between the parties because of a defective acceptance of an offer to sell. In the instant case, Appellants can make no such claim. Mrs. Sandberg accepted $19,000.00 over a period of nine years, including a down payment on the very contract in question.

> obtained had it applied. The doctrine that at the time of making of the contract there must be mutual fixed obligations is not tenable. (Emphasis added.)

Mutuality consists of the obligation of each party to do, or permit something to be done, in consideration of the act or promise of the other. 17 C.J.S. Contracts §100(1)(a)(1963).

This Court in the Allen case, supra, speaking of mutuality, equated it with consideration and stated:

> (e) The argument that there is no mutuality of obligation in the instant case simply conveys the objection that the defendant's promise of employment, being terminable at will, is not sufficient consideration to sustain the negative covenant. Professor Williston states that "no briefer definition of sufficient consideration in a bilateral contract can be given than this: Mutual promises in each of which the promisor undertakes some act or forbearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void, are sufficient consideration for one another." Williston on Contracts, Revised Edition, Volume I, §103 F. (Emphasis added.)

In this case, Appellants had promised to sell the land and by such promise subjected themselves to an action for Specific Performance. Respondent had promised to purchase the land, had paid $17,000.00 in option payments, had exercised the option and had made a $2,000.00 down payment. Respondent had further agreed and promised that in the event of his default, he would forfeit the payments made.

On page 84 of their brief, Appellants ask: "The salient question is, what would a court have found had Mrs. Sandberg sued, alleging the Option Agreement and the letter and check as a con-

tract against Klein?" The answer can be given without hesitation: Mrs. Sandberg would have had the contractual default remedies available to her.

The Earnest Money Receipt provides,

> Said contract shall contain the usual provision for forfeiture in the event of default by the buyer . . . . (R.295)

Paragraph 5f of the Option Agreement which "ratified" (R.298) the option set forth in the Earnest Money Receipt provides,

> f. In the event of default by the Buyer under the Option Agreement or under the Contract to Purchase, such land as has not been conveyed by deed to buyer shall revert to the Seller, and any advance payment as of such time of default shall be forfeited by the buyer and remain the property of the seller as liquidated damages. (R.301,302)

It is seen from the documents that the seller's remedy in the event of a default of the buyer is that of a forfeiture of the consideration paid by the buyer. This right of the seller to forfeit the buyer's payments in the event of his default was not lost to the seller by the absence of a formal contract on or before June 14, 1971. There is no conceivable fact situation under the documents where the Appellants ever lost or will ever lose the right to declare a forfeiture in the event of default.

Appellants note on page 84 of their brief that there is not a signed copy of the March 30th letter in the file. The record is clear that Respondent delivered the letter. The record is likewise clear that Mrs. Sandberg received the letter. Since the letter was delivered to and received by Mrs. Sandberg, it must be presumed that she has the original thereof. With respect to Appellants'

argument on mutuality the presence or absence of the letter seems of little import. Respondent's promise to forfeit did not in any way depend upon the not yet executed contract nor the letter.

POINT IX

SPECIFIC PERFORMANCE IS THE ONLY REMEDY AND WAS PROPER

The matters set forth in subsections a., b., c. and d. on pages 87 through 93 of Appellants' brief are repetitious and have been previously discussed. Respondent has countered each of these arguments at least once in the foregoing pages of this brief. In summary it can be said that Respondent exercised the option in June of 1971 with a notation on his June 7th check that it constituted

> down payment to commence June 15th agreement, 1971

and that Mrs. Sandberg accepted the same.

Appellants on page 94 of their brief in the subsection e. call to the Court's attention a mathematical error. In his letter of March 30, Respondent stated that he had previously paid $18,000.00. The evidence now is that he had paid at that time only $17,000.00 and that with the down payment he had paid a total of $19,000.00 and not $20,000.00. The error was first discovered late during the course of this litigation. Appellants are certainly entitled to a correction and a principal balance due of $67,368.00 and not $66,368.00. Respondent so stipulates.

Respondent asserts, however, that under the facts and circumstances, the mathematical error does not justify the reversal of the trail court's Judgment. It was an error in the March 30th

letter to which Mrs. Sandberg didn't object. She accepted the $2,000.00 down payment some two months after receipt of the letter. Her counsel in the pre-litigation correspondence never asserted the mathematical error as a reason for refusing to proceed. Appellants' counsel never raised the issue with the trial court. While we do not minimize the value of one thousand dollars, the legal effect of the one thousand dollar error under the circumstances of this case is de minimus and is easily repaired.

Equity should deny to Appellants the relief they now claim for the mathematical error.

CONCLUSION

Specific Performance is an equitable remedy. Respondent submits that an objective view of the equities involved will compel the conclusion that the Judgment of the Trial Court ordering Specific Performance should be affirmed.

Respondent faithfully performed the terms of the Earnest Money Receipt and the Option Agreement. He timely made every payment provided for therein and those payments were accepted by Mrs. Sandberg. Respondent caused the property to be annexed to the City of St. George. He caused the property to be surveyed and paid for the survey. In March of 1971, some nine (9) years after the Earnest Money Receipt and some seven (7) years after the Option Agreement, and after making two (2) payments each year, totaling $17,000.00, Respondent advised Mrs. Sandberg that he would be exercising the option in June of 1971. He requested her cooperation in completing the survey. He paid to the County of Washington a $100.00 fee for

the establishment of a survey marker. He paid and Mrs. Sandberg accepted on June 7, 1971, a $2,000.00 down payment to exercise the option and to put the contract into effect. He acquiesced in the request of Mrs. Sandberg that the survey be delayed, thereby delaying the completion of a formal contract. In April of 1972, when Respondent discovered Mrs. Sandberg's reluctance to proceed with the survey, he took the initiative, ordered the survey, paid for the same, prepared a contract and signed it and forwarded the same to Mrs. Sandberg, together with the first required annual payment almost one month before the first annual payment was due under the terms of the Option Agreement and the anticipated contract.

It is obvious from the foregoing that Respondent proceeded with good faith, in making payments, making arrangements for the annexation, arranging and paying for the survey and preparing and signing the contract and by doing every proper possible thing he could to exercise his rights and to see the purchase of the property to a conclusion.

In contrast, the position of Appellants is entirely devoid of equities. Mrs. Sandberg accepted $19,000 over a period of nine (9) years. The final $2,000.00 was accepted June 7, 1971, as the down payment required by the terms of the option to exercise the same. Mrs. Sandberg acknowledged that the option had been exercised by releasing and conveying 40 acres to Respondent. She watched, urged, supported and cooperated with Respondent with respect to annexing and surveying matters. She filed an inventory and appraisement in the matter of the Estate of Wayne Sandberg which neglected to reflect the contract rights of Respondent and she

requested a delay in the survey. Sometime after December, 1971, she stated to others that Respondent had purchased the property. Then, in May of 1972, some ten (10) years after the original Earnest Money Receipt and after receipt by her of $19,000.00, did Mrs. Sandberg first assert that Respondent's rights had terminated.

The legal technicalities, niceties, arguments and sophistry set forth in the 103 page brief of Appellants do not support the conclusions claimed by Appellants and they certainly do not change the equities. To grant to Appellants the relief sought by them to quiet title and to forfeit the Respondent's payments and his efforts and expenses with respect to the property would be inequitable and unjust in the extreme.

It is only equitable that this Court affirm the Judgment and Decree of Specific Performance made and entered by the Trial Court.

RESPECTFULLY SUBMITTED this 29 day of August, 1977.

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ATTORNEYS FOR DEFENDANT-RESPONDENT

CERTIFICATE OF MAILING

The undersigned hereby certifies that he served two (2) copies of the foregoing BRIEF OF RESPONDENT upon Appellants herein by mailing copies hereof, first class, postage prepaid, to their attorney Michael D. Hughes of Allen, Thompson, Hughes & Behle, 148 East Tabernacle, St. George, Utah 84770, this 29 day of August, 1977.